

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

APR 11 1994

In the Matter of)	FEDERAL COMMUNICATIONS COMMISSION
)	OFFICE OF SECRETARY
Computer III Remand Proceedings)	CC Docket No. 90-623
Bell Operating Company Safeguards)	
and Tier 1 Local Exchange Company)	
Safeguards)	
)	
)	
Application of Open Network)	CC Docket No. 92-256
Architecture and Nondiscrimination)	
Safeguards to GTE Corporation)	

COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits these Comments in response to the Public Notice released in the above referenced proceedings on March 10, 1994.¹

In the Notice, the Commission solicited further comment on a matter that the Commission has addressed time and time again -- customer proprietary network information ("CPNI"). In this particular instance the Commission has chosen to focus its analysis on the customer privacy prong of its previously adopted balancing approach to consideration of CPNI issues. As explained below, BellSouth's view is that while customer privacy is generally a legitimate concern with which the Commission's rules must contend, no change in the existing rules is necessary to accommodate that concern.

¹ Public Notice, Additional Comment Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information, CC Docket No. 90-623, CC Docket No. 92-256, FCC 94-63 (rel'd Mar. 10, 1994) ("Notice").

No. of Copies rec'd
List ABCDE

The history of the Commission's consideration of CPNI issues is well documented and need not be chronicled again here. Throughout this history, the Commission has crafted its rules to achieve a balance between three competing interests: competitive equity, efficiency of integration of enhanced service and CPE operations for carriers subject to the CPNI rules, and customer privacy interests. As recently as last week, the Commission again confirmed that the balance it had struck in previous considerations of CPNI rules adequately responded to these competing interests when it imposed on GTE's enhanced service activities the same CPNI safeguard as are imposed on those activities of the BOCs.²

In light of this long history and recent reaffirmation of the past result, any change in weighting of the components of this balancing approach will have to be specifically justified in the context of significantly changed circumstances, lest the decision be rendered arbitrary and capricious. Moreover, any departure from the past consideration of the relative weight of privacy concerns would have to be reconciled with the Commission's recent consideration of privacy concerns in analogous contexts. Thus, BellSouth urges the Commission to keep the

² Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Report and Order, CC Docket No. 92-256, FCC 94-58 (rel'd April 4, 1994) at para. 45.

following factors in mind as it evaluates the recommendations of policy change that are sure to be offered in this proceeding.

First, the Commission needs to adequately define the interests it is seeking to protect in order to properly frame its inquiry in this proceeding. For example, the Commission alludes in the Notice to LECs' recently announced plans for various alliances or mergers with traditionally non-telephone company associates, implicitly suggesting that such alliances might adversely affect customer privacy concerns.³ In the absence of a well-defined privacy interest around which the Commission might seek to recraft its rule, however, no valid assessment can be made of the impact on such an interest that potential (or hypothetical) alliances might generate. Thus, any parties suggesting modification to the Commission's rules on the basis of heretofore amorphous "privacy concerns" should be put to the stern task of defining precisely what those concerns are and of demonstrating precisely how any rule they advocate would better protect those concerns without infringing on the other components of the Commission's balancing approach.

Additionally, in attempting to define the privacy interest that it seeks to protect, the Commission should recognize the distinction between privacy interests of residential customers and confidentiality concerns of

³ Notice at 2-3.

business customers. It is perhaps significant that existing privacy laws,⁴ as well as current governmental initiatives to assess the need for broad privacy principles in the private sector,⁵ all generally focus on the privacy rights or expectations of individuals.⁶ While businesses may have some expectation of confidentiality or proprietary protection of business records, those expectations are of a commercial nature and do not derive from the intimate or personal nature of the material upon which an individual's expectation might stand. Further, BellSouth is aware of no instance in which businesses have been held to have a protectable "privacy" interest in a constitutional sense or in any sense unrelated to the commercial nature of the asserted interest. In short, the Commission must be careful not to be swayed by arguments that surely will come that small business customers need greater "privacy" protection than is afforded by the current rules.

⁴ See, e.g., Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897, codified in major part at 5 U.S.C. Sec. 552a ("Privacy Act").

⁵ Inquiry on Privacy Issues Relating to Private Sector Use of Telecommunications Related Personal Information, National Telecommunications and Information Administration, Notice of Inquiry, 59 Fed. Reg. 6842 (Feb. 11, 1994).

⁶ Indeed, the legislative history of the Privacy Act makes clear that the Act applies only to individuals and not to commercial entities. The purpose of the definition of "individual" in the Act was to "distinguish between the rights which are given to a citizen as an individual under this Act and the rights of proprietorships, businesses, and corporations which are not intended to be covered by this Act." S. Rept. No. 93-1183, 93rd Cong., 2d Sess. 79 (1974).

Also, the Commission must be prepared, as it has been in the past, to recognize that the privacy interest being protected is not absolute, but that it must be tempered by other public policy objectives. The Commission has done so previously when adopting the current rules by recognizing that efficiency of operations for those carriers subject to the rules is an important public interest objective in that it facilitates that availability of desirable services in the consumer market. More recently, the same consideration was addressed in an analogous context.

In the recent Caller ID decision,⁷ the Commission acknowledged that customers may have some expectation, grounded in "privacy theory", that their telephone number should not be delivered to their called party. The Commission concluded, however, that public interest in the development of new services dependent on calling party number delivery warranted a prohibition on general blocking of the calling party number (per-line blocking) on interstate calls, lest such blocking provisions stifle the development of the necessary market for those services.

The Commission has also tempered its treatment of privacy interests with recognition of marketplace realities in other contexts. For instance, the Commission has shown a

⁷ Rules and Policies Regarding Calling Number Identification Service -- Caller ID, Report and Order and Further Notice of Proposed Rulemaking, CC Docket NO. 91-281, FCC 94-59, (rel'd Mar. 29, 1994) ("Caller ID Order").

consistent recognition of the special relationship between a customer and a company with whom the customer does business, compared with a "relationship" between an individual and a company with which the individual has not previously had a business relationship. Thus, in its order adopting rules to implement the Telephone Consumer Protection Act of 1991,⁸ the Commission concluded on the basis of public comments and on Congressional indications in the TCPA's legislative history

that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship. . . . Finally, . . . we find that a consumer's established business relationship with one company may also extend to the company's affiliates and subsidiaries.⁹

Moreover, in that same proceeding, the Commission broadly defined "established business relationship":

[T]he rules define "established business relationship" as a prior or existing relationship formed by a voluntary two-way communication between the caller and the called party, which relationship has not been previously terminated by either party. The relationship may be formed with or without an exchange of consideration on the basis of an inquiry, application, purchase or transaction by the residential telephone subscriber

⁸ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CC Docket No. 92-90, FCC 92-443 (rel'd Oct. 16, 1992) ("TCPA Order").

⁹ TCPA Order at para. 34 (emphasis added).

regarding products or services offered by the telemarketer.¹⁰

This same concept of a company's use of telephone generated information about its customers was carried forward -- in fact, expanded -- in the Caller ID decision. Whereas the rules adopted to implement the TCPA would not permit the use of transmitted calling party number such as ANI by a company "capturing" such information, the ANI rules adopted in the Caller ID proceeding expressly permit the ANI recipient to use such information for future marketing purposes.¹¹

These decisions, all recent, are entirely consistent with the Commission's current CPNI rules governing BOCs' use of residential customers' CPNI. Additionally, like the "do-not-call" opportunities under the TCPA and the per-call blocking availability under the Caller ID rules, the CPNI rules provide customers who have heightened privacy expectations a means of protecting those expectations by requesting that their CPNI not be used for certain marketing purposes. Thus, BellSouth submits that to the extent residential consumers have any legitimate expectation of privacy associated with BellSouth's access to or use of records of its customers, those expectations are satisfied by the current CPNI rules.

¹⁰ TCPA Order at para. 35 (footnote omitted).

¹¹ Caller ID Order, at para. 58.

Moreover, to the extent a customer's expectation of privacy is at stake in this proceeding, and particularly if the Commission is considering even more stringent CPNI safeguards to protect that expectation, the Commission (or parties urging such a result) will have to explain why customers served by carriers subject to such rules require such protection more than customers served by other carriers and other businesses. By this observation, BellSouth does not intend to suggest that all carriers should be subjected to CPNI rules. Indeed, BellSouth has long argued against the inefficiencies even of today's rules and would not wish such maladies on anyone. Nonetheless, the Commission must face the reality that a privacy expectation (however great or small) is a privacy expectation and should not be expected to vary based on the identity of the service provider.

Along a similar vein, the Commission must be prepared to explain why any privacy expectation recognized with respect to LECs' possession of customer network data requires greater protection than the same or similar information in the possession of IXC's or others.¹² Indeed, the Commission's inquiry should not be limited to

¹² Indeed, IXC's have just as much been in the news with respect to mergers and alliances and entry into new businesses, including local exchange service, as have the BOCs. To the extent such alliances by BOCs are deemed to impact their customers' privacy concerns, similar alliances by IXC's can no less affect their customers' privacy expectations.

consideration merely of whether the BOCs' and other LECs' customer records merit "special" privacy protection, but should address the fundamental question of whether CPNI rules for a handful of carriers is an appropriate tool for protection of customers' privacy expectations.

Finally, BellSouth cautions the Commission in advance to be wary of any customer privacy argument advanced by providers of enhanced or information services as a justification for modifying existing CPNI rules. Such an argument will merely be a ruse for rearguing the competitive equity prong of the Commission's balance.¹³ The credibility of such an argument by any of these parties is immediately suspect given their historical desire to have the same access to CPNI as the BOCs, in total disregard of the privacy concerns of those whose information they seek.

Indeed, the shallowness of these parties' concern for customer privacy expectations is revealed by the past suggestion¹⁴ that they be afforded access to such information, which they would then protect against disclosure to the rest of the universe. Such an open ended

¹³ While this issue has long been these parties' hot button, nothing in the consideration of privacy concerns mitigates in favor of providing them greater access to CPNI. The only alternative they will argue, therefore, is that BOCs' access should be more restricted. While this argument may be made in the vernacular of privacy protection, the Commission should be able quickly to see through to the ulterior objectives of such an argument.

¹⁴ See Petition for Reconsideration of Cox Enterprises, CC Docket No. 90-623 (filed March 6, 1992).

obligation for the BOCs to disseminate customer information to anyone who promises not to disclose it further would eviscerate any privacy expectation customers now enjoy today. The obvious interest of these parties is in obtaining unfettered access to CPNI or in preventing the BOCs from accessing it. Thus, any argument by these parties must be seen for what it will be -- a poorly veiled attempt to jump on the privacy bandwagon in order to achieve their long-standing objective of retarding LECs' access to their own customer records simply because the competitors do not have the same information as readily available to them.

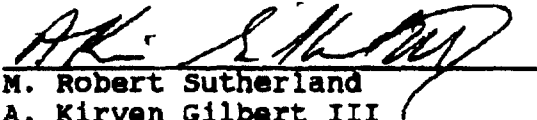
CONCLUSION

BellSouth and other LECs have a longstanding track record of dignifying customer expectations of privacy or confidentiality of their telephone records. While the telecommunications marketplace is undergoing rapid growth and change, nothing suggests that the current CPNI rules will prove to be inadequate in the new environment. Indeed, the current rules already provide protection for those individuals desiring a heightened privacy threshold. BellSouth urges the Commission to remain consistent in its recognition of the legitimacy of sharing customer

information among integrated affiliates and of the current balance of privacy, efficiency, and competitive equity interests.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.
By its Attorneys



M. Robert Sutherland
A. Kirven Gilbert III

4300 Southern Bell Center
675 W. Peachtree Street
Atlanta, Georgia 30375
(404) 614-4897

Date: April 11, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of April, 1994, serviced all parties to this action with a copy of the foregoing COMMENTS in reference to CC 90-623 and 92-256, by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.

A handwritten signature in cursive script, reading "Julia W. Spires", written over a horizontal line.

Julia W. Spires

SERVICE LIST
CC DOCKET NO. 90-623

Phillip D. Mink
Michale A. Isele
Citizens for a Sound
Economy Foundation
470 L'Enfant Plaza, S.W.
East Bldg., Suite 7112
Washington, D.C. 20024

Constance K. Robinson
Richard L. Rosen
Communications and Finance
Section-Antitrust Division
U.S. Department of Justice
555 4th Street, N.W.
Washington, D.C. 20001

Stephen D. Ruud
Colorado PUC
1580 Logan St., OL-2
Denver, CO 80203

Josephine S. Trubek
Rochester Telephone Corp.
180 South Clinton Ave.
Rochester, NY 14646

Heather R. Wishik
Vermont Dept. of Public
Service
120 State St.
State Office Bldg.
Montpelier, VT 05620

William A. Broadhead
AccessPlus Communications
325 - 118th Ave, S.E.
Suite 300
Bellevue, WA 98005

Paul Rodgers
Charles D. Gray
James Bradford Ramsay
NARUC
1102 ICC Bldg.
P.O. Box 684
Washington, D.C. 20044

Susan D. Simms
Cheryl Walker Davis, Dir.
Office of Special Assistants
Pennsylvania PUC
P.O. Box 3265
Harrisburg, PA 17120

W. Benny Won
Oregon PUC
Dept. of Justice, General
Counsel Division
Justice Building
Salem, Oregon 97310

Hollis G. Duensing
AAR
50 F Street, N.W.
Washington, D.C. 20001

Paul E. Nolting
Unisys Corporation
P.O. Box 500/MS B312
Township Line and Union
Meeting Roads
Blue Bell, PA 19424

J. Roger Wollenberg
W. Scott Blackmer
Jonathan Jacob Nadler
IBM
2445 M Street, N.W.
Washington, D.C. 20037

Irwin A. Popowsky
Philip F. McClelland
Pennsylvania Office of
Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

William J. Cowan
New York State PSC
Three Empire State Plaza
Albany, New York 12223

John F. Dodd
Brad I. Pearson
ITN
One Kansas City Place
1200 Main Street, 35th Floor
Kansas City, MO 64105-2107

E. William Kobernusz
VP - Regulatory
SNET
227 Church Street
New Haven, Connecticut 06510-1806

Martin T. McCue
Linda Kent
USTA
900 19th St., N.W.
Suite 800
Washington, D.C. 20006-2105

Saul Fisher
Mary McDermott
Campbell L. Ayling
Shelley E. Harms
NYNEX
120 Bloomingdale Road
White Plains, NY 10605

James R. Young
Lawrence W. Katz
Bell Atlantic
1710 H Street, N.W.
Washington, D.C. 20006

John K. Rose
William D. Baskett III
Thomas E. Taylor
Cincinnati Bell
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

Howard C. Davenport
Peter G. Wolfe
Lisa C. Wilson
District of Columbia PSC
450 Fifth Street, N.W.
Washington, D.C. 20001

Douglas E. Neel
VP - Regulatory Affairs
MessagePhone, Inc.
5910 N. Central Expressway
Suite 1575
Dallas, TX 75206

Robert C. Mackichan, Jr.
Vincent L. Crivella
Michael J. Ettner
GSA
18th & F Streets, N.W., Room 4002
Washington, D.C. 20405

Philip L. Verveer
Sue D. Blumenfeld
John L. McGrew
Dun & Bradstreet Corp.
Three Lafayette Centre
1155 21st St., N.W., Suite 600
Washington, D.C. 20036

David Cosson
L. Marie Guillory
NTCA
2626 Pennsylvania Ave., N.W.
Washington, D.C. 230037

Henry L. Baumann
Terry L. Etter
NAB
1771 N Street, N.W.
Washington, D.C. 20036

R. Michael Sankowski
Jeffrey S. Linder
Todd M. Stansbury
TCA
1776 K Street, N.W.
Washington, D.C. 20006

Don L. Keskey (P 23003)
Henry J. Boynton (P 25242)
Michigan PSC
1000 Long Boulevard
Suite 11
Lansing, MI 48911

Leon M. Kestenbaum
US Sprint
1850 M Street, N.W., Suite 1110
Washington, D.C. 20036

Lynn S. Jordon
Stroh
900 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222

Wayne V. Black
C. Douglas Jarrett
Brian T. Ashby
API
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036

Jeffrey L. Sheldon
UTC
1620 Eye Street, N.W.
Suite 515
Washington, D.C. 20006

Richard McKenna, Will
GTE
P.O. Box 152092
Irving, TX 75015-2095

Daniel L. Bart
GTE
1850 N Street, N.W.
Suite 1200
Washington, D.C. 20006

Herbert E. Marks
James L. Casserly
Amy O. Scott
IDCMA
P.O. Box 407
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

Janice E. Kerr
Edward W. O'Neill
Ellen S. Levine
State of California and
PUC of State of California
505 Van Ness Ave.
San Francisco, CA 94102

F. Sherwood Lewis
ICS
1776 K Street, N.W.
Suite 700
Washington, D.C. 20006

Francine J. Berry
David P. Condit
Edward A. Ryan
AT&T
295 North Maple Avenue
Room 3244J1
Basking Ridge, NJ 07920

Benjamin H. Dickens, Jr.
Gerard J. Duffy
AICC
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037

Peter Bn. Kenney, Jr.
CBEMA
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036

Henry D. Levine
Mary K. O'Connell
ONA Users Group
2000 Pennsylvania Ave., N.W.
Suite 5500
Washington, D.C. 20006

Randolph J. May
Richard S. Whitt
Compuserve Inc.
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Compuserve Inc.
5000 Arlington Centre Blvd.
P.O. Box 20212
Columbus, Ohio 43220

Jean M. Prewitt
Phyllis E. Hartsock
PSC
NTIA
U.S. Dept. of Commerce
Room 4713
14th St. and Constitution
Ave., N.W.
Washington, D.C. 20230

Richard C. Bellak
Florida
101 East Gaines Street
Tallahassee, FL 32399-0862

Herbert E. Marks
Jody D. Newman
State of Hawaii
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, D.C. 20004

Angela Burnett
IIA
555 New Jersey Ave., N.W.
Suite 800
Washington, D.C. 20002

Floyd S. Keene
Brian R. Gilomen
Michael S. Pabian
Ameritech
Room 4H64
2000 West Ameritech Center Dr.
Hoffman Estates, IL 60196-1025

Lawrence E. Sarjeant
Kathryn Marie Krause
U.S. West
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Durward D. Dupre
Richard C. Hartgrove
Michael J. Zpevak
Southwestern Bell
1010 Pine Street
Room 2114
St. Louis, Missouri 63101

James P. Tuthill
Jeffrey B. Thomas
Pacific Bell and Nevada Bell
140 New Montgomery St.
Room 1522-A
San Francisco, CA 94105

Herbert E. Marks
Joseph P. Markoski
Ann J. LaFrance
Kerry E. Murray
ADAPSO
1201 Pennsylvania Ave., N.W.
P.O. Box 407
Washington, D.C. 20044

Carol F. Sulkes
VP - Regulatory Policy
Central Telephone
8745 West Higgins Road
Chicago, Illinois 60631

James U. Troup
INS
1919 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20006

Albert H. Kramer
Robert F. Aldrich
APCC
1201 New York Ave., N.W.
Penthouse Suite
Washington, D.C. 20005

Frank W. Krogh
Donald J. Elardo
MCI
1133 19th St., N.W.
Washington, D.C. 20036

Richard E. Wiley
Michael Yourshaw
Katherine A. King
ANPA
1776 K St., N.W.
Washington, D.C. 20006

R. Michael Senkowski
Jeffrey S. Linder
John C. Hollar
ATSI
1776 K St., N.W.
Washington, D.C. 20006

John P. Kelliher
Illinois Commerce Commission
180 North LaSalle Street
Suite 810
Chicago, Illinois 60601

Werner K. Hartenberger
Leonard J. Kennedy
J.G. Harrington
Cox Enterprises
1255 - 23rd St., N.W.
Suite 500
Washington, D.C. 20037

David B. Thomas, President
Salt Lake Voice Exchange
244 West 400 South
Salt Lake City, Utah 84101